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Philip R. Consolo,

Federal Maritime Commission,
United States of America,
and
Flota Mercante Grancolombiana,

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF RESPONDENT FLOTA MERCANTE
GRANCOLOMBIANA, S.A., IN OPPOSITION

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MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 992

PHILIP R. CONSOLO, *Petitioner*

v.

FEDERAL MARITIME COMMISSION

UNITED STATES OF AMERICA

and

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT FLOTA MERCANTE GRANCOLOMBIANA, S.A., IN OPPOSITION

JURISDICTION

The rulings of the Court of Appeals subject of Petitioner's first two questions presented—that that Court had jurisdiction in all respects, under the Administrative Orders Review Act of 1950 (Hobbs Act), 5 U.S.C. § 1031, *et seq.*, and that it was necessary to consider

the equity of the reparations award—were made not in that Court's December 1964 decision in Case Nos. 18,230 and 18,235, but in its opinion and judgment of April 26, 1962 in Nos. 15,330, 16,366 and 16,369, when this controversy was first before it. Petitioner has failed to perfect this Court's jurisdiction to rule upon these two questions, by failing to file certified copies of the lower Court's judgment of April 26, 1962, or of Petitioner's underlying motion directed to the jurisdictional issue, or of other pertinent documents. Also, he has thereby violated this Court's Rule 21(1) and 21(3), which require the filing of a transcript of "all the proceedings in the Court below, the whole to be duly certified by the clerk of that Court".

To the extent the Court of Appeals' April 1962 judgment may be regarded as "final" for review purposes,[1] under 5 U.S.C. § 1040 and 28 U.S.C. 1254(1), Petitioner's failure to file a petition for writ of certiorari within 90 days after April 26, 1962 renders that judgment, including the Court's ruling that it had jurisdiction, immune from collateral attack in this proceeding. " 'The principles of res judicata apply to questions of jurisdiction as well as to other issues', as well to jurisdiction of the subject matter as of the parties." *Treines* v. *Sunshine Mining Co.,* 308 U.S. 66, 78

[1] The Court's judgment of April 26, 1962 was the final order entered in Case Nos. 15,330, 16,366 and 16,369. In addition, by that judgment the Court of Appeals set aside the Federal Maritime Board's reparation order of March 30, 1961 against Flota, which had the result of rendering the reparations order unenforceable under Section 30, Shipping Act, 1916 (46 U.S.C. § 829), of relieving Flota of obligation to pay the principal or continuing interest therein provided, and of dismissal by Petitioner of his then pending enforcement suit in the United States District Court for the District of Maryland (No. 13,665).

(1939); *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 166 (1932); *Baldwin* v. *Iowa State Traveling Men's Assoc.,* 283 U.S. 522, 525-26 (1931). See also *Angel* v. *Bullington,* 330 U.S. 183 (1947).

But even if the 1962 judgment is regarded as wholly interlocutory, if Petitioner desired to appeal the rulings there made, it was incumbent upon him to file with his present Petition a certified copy of that judgment and of his underlying motion papers in which he stated his position as to the lower Court's jurisdiction under the Hobbs Act. The importance of this failure is underscored by the fact that his Petition does not accurately state his position before the Court of Appeals upon that issue; the papers he failed to file with this Court disclose that Petitioner actually *invited* the lower Court to take jurisdiction in the very respects in which, having ultimately lost on the merits, his Petition now challenges. (See Appendices A, B and C of this Brief, and further discussion under Argument, Point I, *infra*). Other omitted papers, the Prehearing Stipulation and Addendum in Nos. 18,230 and 18,235, show that in the later round of litigation culminating in the December 17, 1964 judgment Petitioner failed to raise either an objection with respect to the Court of Appeals' jurisdiction or the matter which he now seeks to raise in his second question presented. (See Appendices D and E, *infra*).

The lower Court's judgment of April 26, 1962 is reprinted as Appendix A to this Brief. Portions of Petitioner's "Motion Of Intervenor Philip R. Consolo 1) To Dismiss The Petition For Review For Lack Of Jurisdiction, or 2) Alternatively To Require Petitioner To File Bond", and Petitioner's "Reply To Answers To Motion To Dismiss Or Require Bond"

are reprinted as Appendices B and C to this Brief. Portions of the Prehearing Stipulation (including Addendum), and Prehearing Order are reprinted as Appendices D and E. Certified copies of the complete text of each of these documents and of the lower Court's April 26, 1962 opinion have been filed with the Clerk of this Court, concurrently with this Brief.[2]

The Petition should be denied for lack of jurisdiction to grant the Writ, for failure to provide the Court with a proper record upon which to consider the Petition, for failure to comply with the Court's Rules, and for not having "disclosed the real situation" as to the Hobbs Act jurisdiction question in the Court below. *Connecticut Railway & Light Co.* v. *Palmer,* 305 U.S. 493, 496 (1939); *Erie Railroad Company* v. *Kirkendall,* 266 U.S. 185 (1924); *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assoc.,* 242 U.S. 430, 431 (1917).

QUESTIONS PRESENTED

1. Where the Court of Appeals had jurisdiction under the Hobbs Act, of (a) a carrier's petition to review a finding of violation of the Shipping Act, to the extent that it served as a basis for a reparations order against the carrier, and (b) the shipper's petition to review the reparations order, in an effort to increase the amount thereof, whether that Court also had juris-

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[2] The Court of Appeals' April 26, 1962 opinion is reprinted in the Petition, Appendix C.

Petitioner also failed to file certified copies of the Petitions for Review in any of the proceedings below. In his Petition for Review in No. 18,235 he invoked the lower Court's jurisdiction under the Hobbs Act to review the Federal Maritime Commission's reparations order to the extent it denied reparations, and described that Court's order as "reviewable under 5 U.S.C. 1031 ff." — which is the Hobbs Act (Petition in No. 18,235, p. 1). (R. 727)

diction to determine the validity of the reparations order, upon challenge by the carrier?

2. Whether the Maritime Commission is required mechanically to award reparations for a period in which the law was unsettled and the carrier was actively and in good faith seeking a declaratory order, where the record compels a finding, and the Court has so found, that such an award would be inequitable?

3. In concluding that there was no basis for the Commission's principal findings, and that the Commission had abused its discretion, did the Court of Appeals apply an improper standard of review?

4. If the Court of Appeals erred in respect of questions 2 and 3, whether its judgment is nevertheless supportable on the grounds of (a) the *ex parte* participation in the Commission's decision on remand, of its attorneys who had previously acted in this case as adversaries against Flota, and (b) the absence of legally cognizable damages to Petitioner.

STATEMENT OF THE CASE

This case involves a private claim by Petitioner Consolo, a shipper, against Respondent Flota Mercante Grancolombiana, S.A. (hereinafter referred to as "Flota"), a steamship company, for reparations for alleged violations of the Shipping Act, 1916 (46 U.S.C. § 801 *et seq.*).

In July 1955, after advertising for interested shippers and receiving no response, and in conformity with long-standing industry custom, Flota entered into a contract with Panama Ecuador, a shipper, for the carriage of bananas from Ecuador to the United States North Atlantic, in the refrigerated ("reefer") facili-

ties of Flota's vessels (JA 19, 77-82, 134-39, 173, 177-87).[3] The contract term was for two years, plus three years at Panama Ecuador's option (JA 183-84). In March 1957, Panama Ecuador qualified for its option (JA 188, 195-99; SJA 181-87); the contract was formally extended on May 22, 1957, for the option period (JA 187-95; SJA 191-92).

On August 20, 1957, the Federal Maritime Board served an order in another case directing Grace Line to cancel its existing contracts with other banana shippers, including Petitioner Consolo, and to offer two-year contracts to all qualified banana shippers upon an allocation basis. The Board's order was premised on a novel theory set forth in its April 30, 1957 Report (which theory was later declared to be invalid).[4]

Petitioner Consolo, by letter of August 23, 1957, requested a share of Flota's space under contract to Panama Ecuador, and threatened litigation (JA 207-08) as did others, based upon the Board's action with respect to Grace Line. Faced with these demands, on one hand, and with threats of a breach of contract suit by Panama Ecuador on the other, Flota petitioned

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[3] Pertinent portions of the agency record were printed in the Joint Appendix, Supplemental Joint Appendix, and Second Supplemental Joint Appendix, filed with the Court of Appeals and certified to this Court. They are herein cited as JA, SJA and SSJA, respectively.

[4] Banana Distributors Inc. v. Grace Line Inc., 5 FMB 278, 283-86 I-II (1957), vacated and remanded, Grace Line Inc. v. Federal Maritime Board, 263 F.2d 709 (C.A.2d 1959). Further proceedings: Banana Distributors, Inc. v. Grace Line, 5 FMB 615 (1959), affirmed, 280 F.2d 790 (C.A.2d 1960) (one judge dissenting), cert. denied 364 U.S. 933 (1961).

the Board for a declaratory order as to the validity of its contract with Panama Ecuador (JA 37-41). The Board delayed decision for almost two years, until July 2, 1959 (JA 41-48, 63-68).

In February 1959, the Board's 1957 *Banana Distributors* v. *Grace Line* decision and order, which had precipitated the claims against Flota, were reversed and vacated (*Grace Line* v. *Federal Maritime Board,* 263 F.2d 709). In May 1959 the Board issued a further order against Grace Line, on a different theory.[5] By decision served July 2, 1959, in the instant case, the Board ordered Flota to cancel its contract with Panama Ecuador, which it promptly did (JA 3-11; SJA 35). This action by the Board was the subject of a petition for review by Flota in No. 15,330 below, under the Hobbs Act. Thereafter, following further hearings on reparations, the Board in March 1961 ordered Flota to pay Consolo $143,370.98 for the period from August 23, 1957 to July 12, 1959, embracing the entire period of the Board's own delay in answering Flota's petition (SJA 25-39; App. D to Petition). This action was the subject of cross-petitions for review below, by Petitioner Consolo, in No. 16,366, and by Flota, in No. 16,369, both under the Hobbs Act.

On July 7, 1961, Consolo filed his "Motion of Intervenor Philip R. Consolo 1) To Dismiss The Petition For Review For Lack Of Jurisdiction, or 2) Alternatively To Require Petitioner To File Bond" (App. B, *infra*), in No. 16,369, which, after argument the Court held in abeyance pending hearing on the merits. By its decision of April 26, 1962 in Nos. 15,330, 16,366

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[5] That order was ultimately sustained, by a split decision, 280 F.2d 790 (C.A.2d (1960), cert. denied, 364 U.S. 933 (1961).

and 16,369, the Court found that it had jurisdiction in all respects and that there was "substantial evidence" supporting Flota's contention that it would be inequitable to force it to pay reparations, vacated the Board's award, and remanded the matter to the Commission, as the Board's successor, for further proceedings (SSJA 360-62; App. C to Petition, pp. 35a-37a).

On remand, without referring to the Court's finding of substantial evidence supporting Flota's contention, and on the basis of the same evidentiary record and the same arguments which that Court had already rejected, the Commission stated that there was no equity whatever in any of Flota's contentions, and reinstated the principal portion of the vacated award. The Commission's opinion, for the first time, challenged the good faith of Flota's actions in 1957, including Flota's petition for declaratory order (SSJA 399-413; App. E to Petition). After further cross-petitions, by Flota in No. 18,230 and by Petitioner Consolo in No. 18,235, the Commission produced its official minutes disclosing that the Commission's report and order on remand were written, *ex parte,* by the same Commission attorneys who had opposed Flota as advocates before the Court of Appeals in the 1962 phase of the proceedings (SSJA 425-26).

Petitioner did not challenge any aspect of the Court's jurisdiction in Nos. 18,230 and 18,235, which were consolidated (App. D, *infra,* pp. 12a-16a). In its opinion of December 17, 1964, the Court below concluded that the Commission had ignored the guideposts of the Court's earlier decision and the substantial weight of the evidence before it; that there was no basis for finding that Flota had not acted in good faith; and that the Commission had abused its dis-

cretion (App. B to Petition). The Court unanimously reversed the Commission's decision and remanded the matter to the Commission with directions to vacate the reparations order (App. F to Petition).

ARGUMENT

The Petition should be denied because (in addition to the matter set forth under the heading of Jurisdiction, *supra*), (1) Petitioner invoked the jurisdiction of the Court below upon his own petitions, and urged that it take jurisdiction also of Flota's petition; (2) the Court of Appeals' ruling that it had jurisdiction was clearly correct; and (3) the Petition presents no conflict in decision or other question of importance.

It should be emphasized that Respondents Federal Maritime Commission and United States both urged that the Court below had jurisdiction in all respects; neither objected to the Court's holding that the equity of the reparations award should be considered; and neither applied to this Court for a writ to review any aspect of the lower Court's decision.

I. Petitioner Should Not Now Be Heard To Challenge the Court of Appeals' Jurisdiction

Petitioner now challenges only the lower Court's jurisdiction to review the reparations orders to the extent they granted reparations, in Nos. 16,369 and 18,230—which involved the identical agency record and in large measure the same issues as upon Petitioner's own petition in Nos. 16,366 and 18,235. However, even this challenge by Petitioner is contrary to his position below, where he *ultimately urged the Court to take jurisdiction of Flota's petition in No.*

16,369, and did not thereafter challenge any aspect of the Court's jurisdiction in No. 18,230.

In Petitioner's "Motion Of Intervenor Philip R. Consolo 1) To Dismiss The Petition For Review For Lack of Jurisdiction, or 2) Alternatively To Require Petitioner To File Bond", and memorandum in support thereof, and Reply to the answers thereto (see App. B and C, *infra*), he first contended that the Court did not have jurisdiction of Flota's petition in No. 16,369, but then argued that there was also evidence to the contrary and *concluded* that the Court had and should exercise jurisdiction under the Hobbs Act—in *both* No. 16,366 and No. 16,369, provided the Court require Flota to post a bond.

Petitioner's principal concern, stated to that Court, was *not* that it lacked jurisdiction of Flota's petition under the Hobbs Act, but the speculative possibility that *if* the Board's reparations orders were affirmed by the Court of Appeals in the Hobbs Act proceeding, and *if* thereafter Flota refused to obey the Board's order, he might then be compelled to resort to an independent "enforcement" proceeding in another Court, pursuant to Section 30, Shipping Act, 1916 (App. B, *infra,* p. 4a). Petitioner conceded to the Court ". . . that the legislative history of the Hobbs Act reveals a definite purpose to provide a new, expeditious, and exclusive method of review of agency orders" (Id., p. 6a); and that ". . . there is some evidence that Maritime Board reparations orders were specifically included within the coverage of the Hobbs Act" (Id., p. 6a). He stated, "Consolo for his part *accepts*[6] any construction of the statute which

[6] Emphasis added throughout this Brief.

results in one law suit leading to one final disposition of the controversy" (Id., p. 5a), and that

> "We repeat that for our part we are *content* with a reading of the statutes which complies with the purpose of the Hobbs Act to simplify and modernize reviews."

He concluded, "Since review was sought here, the issues should be openly, fairly and finally litigated here—as Congress intended" (App. C, *infra,* p. 10a).[7]

After the Court's subsequent decision that it had jurisdiction, remand, and a further reparations order by the Commission, Petitioner again invoked the Court's jurisdiction under the Hobbs Act to review his petition in No. 18,235, and did not thereafter challenge the lower Court's jurisdiction to review Flota's petition in No. 18,230. Only after he ultimately had lost on the merits, did Petitioner flatly object to the lower Court's jurisdiction, in his petition to this Court.

The writ of certiorari is a discretionary writ. Even if there were a substantial and important question as to the jurisdiction of the lower Court under the Hobbs Act, which there is not, this would be a peculiarly inappropriate case for this Court to exercise its discretion to grant the petition. Issuance of a writ under the circumstances described would be promoting the

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[7] In his later brief, dated December 8, 1961, filed in Nos. 16,366 and 16,369, Petitioner concluded: "Flota has chosen to seek review of the award in this Court. All the facts are before the Court, and the controversy is ripe for final disposition. Accordingly, the Court should enter an order terminating the controversy by requiring Flota to pay Consolo the full reparation claimed in No. 16,366". (A certified copy of this brief has been filed with the Clerk of this Court). (R. 873; see also R. 824).

very "sporting theory of justice", which this Court has hitherto rejected. *Communist Party* v. *S.A.C. Board,* 367 U.S. 1, 31 (1961).

II. The Ruling of the Court of Appeals on the Jurisdictional Issue is Correct

The Hobbs Act gives the Court of Appeals exclusive jurisdiction "to enjoin, set aside, suspend, in whole or in part, or to determine the validity of" such final orders of the Federal Maritime Board as "are now subject to judicial review" pursuant to Section 31 of the Shipping Act, 46 U.S.C. §830. Section 31 of the Shipping Act provided that

> ". . . the venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as herein otherwise provided be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties."

Petitioner must now contend in effect that Section 30, which authorized an "enforcement" suit "in case of violation of any order . . . for the payment of money . . .", provided the exclusive procedure for review of reparations orders under the Shipping Act and limited a carrier's review to defense of a suit under Section 30; that such was the case with respect to review of Interstate Commerce Commission reparations orders; and that therefore Section 31 was wholly inapplicable. But if all of Petitioner's premises were accepted, *arguendo,* still his conclusion that Section 31 was wholly inapplicable to enforcement suits under Section 30, is unsupportable. Section 31 applied in terms to "*any* order", without exception for reparations orders, and to "suits brought to *enforce,* suspend, or

set aside, in whole or in part, any order . . .", etc. Even if Section 30 had been intended to provide the exclusive method for review of a reparations order, Section 31 applied the full range of venue and procedure provisions applicable to Interstate Commerce Act orders, to suits under Section 30, except to the limited extent Section 30 "otherwise provided".

Further, even petitioner's premise that Shipping Act reparations orders were intended to be reviewed only "as in similar suits in regard to orders of the Interstate Commerce Commission", assumes the application of Section 31, in which the quoted language appears. Moreover, there is no indication that Congress in fact intended that Section 30 provide the exclusive method of, or venue and procedure for, review of Shipping Act reparations orders, whatever the result under the Interstate Commerce Act. The concluding provision of Section 31, that "suits brought to enforce, suspend, or set aside", etc., "may *also* be maintained in any district court having jurisdiction of the parties", is affirmative evidence to the contrary. However viewed, reparations orders were to some extent subject to Section 31 prior to the Hobbs Act, and therefore are now subject to the Hobbs Act.

Consolo's present contention would read the words "to enforce" out of Section 31; would impose unintended limitations upon the words "any order"; would frustrate the declared purpose of the Hobbs Act to apply to "all reviewable orders of the Maritime Commission" and "to secure uniform procedure with respect to all reviewable orders";[8] and, as the Court

[8] Hearings before Subcommittees of House Committee on the Judiciary on H.R. 1468, 1470, 2271, 80th Cong. 1st Sess. (1947), pages 137, 145, 149-50; H. Rept. No. 2122, 81st Cong. 2d Sess. (1950).

below held, would permit the anomalous situation of having the Court of Appeals review a reparations order to see if it should be increased in amount, as Consolo urged in Nos. 16,366 and 18,235, but of preventing it from considering, upon the same record, whether the award was excessive in amount or otherwise invalid, as Flota urged in Nos. 16,369 and 18,230.

The fact that Petitioner himself invoked the lower Court's jurisdiction to review the Board's reparations orders, in both No. 16,366 and, after remand, in No. 18,235, is a further answer to Petitioner's contention. Section 9 of the Hobbs Act, 5 U.S.C. § 1039(a) (App. A to Petition, p. 4a) provides that "Upon the filing and service of a petition to review, the Court of Appeals . . . shall have exclusive jurisdiction to make and enter . . . a judgment determining the validity of . . . the order of the agency". Once the Court's jurisdiction was invoked by Petitioner Consolo, the Court had exclusive jurisdiction to determine the validity of the orders in question—whether or not it otherwise would have jurisdiction.[9]

Finally, at the time the Shipping Act was passed in 1916, the state of the law under the Interstate Commerce Act was that I.C.C. reparations orders were reviewable at the instance of the carrier, without awaiting an enforcement suit. *Southern Ry. Co.* v. *United States,* 193 Fed. 664 (Commerce Ct. 1911); *Arkansas*

[9] Further, the Court's ultimate finding that the Commission had abused its discretion in awarding any reparations, is as relevant in response to Petitioner's attempt to increase reparations in No. 18,235, as in response to Flota's attack upon the award made in No. 18,230. Therefore, even if the lower Court technically lacked jurisdiction of Flota's petition in No. 18,230, it had jurisdiction to enter the ultimate finding of which petitioner complains.

Fertilizer Co. v. *United States,* 193 Fed. 667 (Commerce Ct. 1911). See also *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.,* 334 F.2d 46 (C.A. 5th 1964), *cert. granted,* No. 606, January 18, 1965, 379 U.S. —. Such review was in the Commerce Court prior to 1913, the jurisdiction of which was transferred by the Urgent Deficiencies Act (Act of October 22, 1913, c. 32, 38 Stat. 208, 219), to the United States district courts. Therefore, even if, by Section 31, Congress had intended that review of Shipping Act reparations orders should exactly parallel review in comparable I.C.C. cases, and had added nothing by either Section 31 of the Shipping Act or by the Hobbs Act, still Congress in 1916 must have intended that a carrier subject to a Shipping Act reparations order should be permitted to initiate review under Section 31—which review is now under the Hobbs Act.

III. Petitioner Has Shown No Other Reason for Granting the Writ

With a paucity of Shipping Act reparations cases—no more than five awards in the first forty-five years of the Act (App. B, *infra,* p. 3a)—it can hardly be maintained that there is any widespread interest justifying consideration of the case by this Court. Petitioner has not claimed that an other case turns upon the ruling below and has shown no conflict requiring resolution. The reported cases are completely consistent with the holding below. The Court explicitly held in *D. L. Piazza* v. *West Coast Line,* 210 F.2d 947 (C.A.2d 1954), *cert. denied,* 348 U.S. 839, that the Hobbs Act conferred jurisdiction to review denial of reparations claims, and this Court declined to review. Hobbs Act jurisdiction was exercised, without challenge, in *Kempner* v. *Federal Maritime Commission,* 313 F.2d

586 (C.A.D.C. 1963), *cert. denied,* 375 U.S. 813, (denial of reparations by the Commission); *Swift & Company* v. *Federal Maritime Commission,* 306 F.2d 277 (C.A.D.C. 1962); and *States Marine Lines* v. *Federal Maritime Commission,* 313 F.2d 906 (C.A.D.C. 1963), *cert. denied,* 374 U.S. 831, the latter two involving petitions for review of the partial denial and also the partial grant of reparations, precisely as in the instant case.

There can be no possible conflict here with *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 440-41 (1949). The Hobbs Act, which is the basis for the Court's ruling below, does not apply at all to I.C.C. orders.[10] Further, in the cited case, the Court held that an I.C.C. order in a reparations case was "an 'order' subject to challenge under 28 U.S.C. §41 (28)", which procedure was incorporated by Section 31, Shipping Act, prior to passage of the Hobbs Act. It also held that review of denial of an I.C.C. reparations order should be in a one judge district court, the same as in an I.C.C. reparations enforcement suit, without a direct right of appeal to the Supreme Court. The very considerations of judicial efficiency underlying that holding argue that review of a Shipping Act reparations order should be in the same court as review of the underlying finding of violation, and of

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[10] The inapplicability of the Hobbs Act to the I.C.C. also distinguishes Interstate Commerce Commission v. Atlantic Coast Line R. Co., No. 606, cert. granted January 18, 1965, 379 U.S. . However, affirmance of the lower Court's decision in that case would provide an alternative basis to support the jurisdiction of the lower Court in the instant case. See concluding paragraph of Argument under Point II, *supra.*

The bill which ultimately became the Hobbs Act would have been applicable to the I.C.C., but by that Agency's specific request it was excluded from the final enactment (Hearings, *supra,* pp. 32-49, 152-72).

the partial *denial* of reparations, both of which Petitioner concedes must be in a Court of Appeals under the Hobbs Act. If any holding would result in an "intolerable" procedure, it is the one for which Petitioner contends.[11]

Petitioner presents no other question to justify the attention of this Court. His contention that the examination by the Court below of the equity of a reparations award presents a "new" and erroneous standard of review is unsupportable. Further, the point was not presented to the Court below on appeal from the Commission's September 1963 reparations order (App. D and E, *infra*).

Sections 14 and 16, Shipping Act, for violation of which reparations were sought, refer to "unfair or unjustly discriminatory" action and "undue or unreasonable preference or advantage" (46 U.S.C. § 813 and § 815). They have built into them, as the Court noted, "the concepts of fairness and reasonableness" (App. B to Petition, p. 13a). Section 22 provides only that the Commission may issue such order as it deems proper, and "may" award reparations (46 U.S.C. §821).[12] Considerations of "fairness" and "justice"

[11] Petitioner urges that *if* the validity of a reparations order is affirmed by the Court of Appeals under the Hobbs Act, and *if* the carrier still refused to pay, it would then become necessary to file an enforcement suit under Section 30. This question obviously is *not* presented here. In any event in such a case, the Hobbs Act findings would have a res judicata effect, as the Court of Appeals properly held (App. C to Petition, p. 32a)

[12] The Court of Appeals, believing the equitable considerations to be relevant to the award of reparations after a finding of violation, did not consider them upon the violation finding. Obviously, such considerations are relevant at one stage or the other; which stage is of little consequence, where, as here, the sole question is reparations.

have long been found to require the withholding of damages or reparations under the Interstate Commerce Act, particularly where, as here, the claimed reparations period is *prior* to enunciation of a new rule of law or standard of conduct and therefore involves retroactivity.[13] The relevance of such equitable considerations has been recognized under the National Labor Relations Act,[14] the Securities and Exchange Act,[15] and a variety of other situations,[16] as recently as the last term of this Court.[17]

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[13] Johnson Seed Co. v. United States, 90 F.Supp. 353 (W.D. Okla., 1950), aff'd 191 F.2d 228 (C.A.10th, 1951); Delaware, Lackawanna & Western Coal Co. v. R.R. Co., 46 I.C.C. 506, 509 (1917); West Coast Lumbermen's Assoc. v. A. & S. Ry. Co., 104 I.C.C. 695, 702 (1925); Boston Wool Trade Assoc. v. Director General, 69 I.C.C. 282, 309, (1922); Andarko Cotton Oil Co. v. A.T. & S.F. Ry. Co., 20 I.C.C. 43, 50 (1910). See also Detroit, G.H. & M. Ry. Co. v. Interstate Commerce Com'n., 74 Fed. 803, 922-23 (C.C.A.6th, 1896). Cf., Baer Bros. Mercantile Co. v. Denver & R.G.R. Co., 233 U.S. 479, 486 (1914).

[14] E.g., 29 U.S.C. § 160(c), and Phelps Dodge Corporation v. NLRB, 313 U.S. 177, 198 (1941) ("The remedy of back pay, it must be remembered is entrusted to the Board's discretion; it is not mechanically compelled by the Act.")

[15] Securities and Exchange Com'n., v. Chenery Corp., 332 U.S. 194, 203 (1947). ("... such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or the legal or equitable principles.")

[16] Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co., 284 U.S. 370 (1932); Gelpcke v. Dubuque, 68 U.S. 175 (1894); Douglass v. Pike County, 101 U.S. 677 (1880); 15 U.S.C.A. § 71s(a); and 26 U.S.C.A. § 7805(b). See also Leedom v. International Brotherhood of Elec. Wkrs., 278 F.2d 237 (C.A.D.C. 1960).

[17] Simpson v. Union Oil Co., 377 U.S. 13, 12 L.ed 2d, 98, 107 (1964) ("We reserve the question whether when all the facts are known there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today.")

Petitioner's final contention is that the Court below made "its own findings of fact" contrary to the Commission's and thereby applied an improper "standard for review". The case was thoroughly briefed, argued and reviewed by the Court of Appeals—not once, but twice. Its opinions evidence painstaking review, and an intimate familiarity with the record. In its first opinion (App. C to Petition, pp. 35a-37a), the Court held that Flota had "marshalled substantial evidence in support of its contention" that it would be inequitable to force it to pay reparations for the period prior to the Board's July 1959 decision, but remanded to the Commission for further consideration. In its second opinion, the Court stated that it had hoped further consideration by the Commission "would throw light on our initial impressions"; and that it had been "prepared to affirm the Commission if it could establish that the circumstances were such as to not make it unfair to assess damages against Flota". Nevertheless, the Court concluded that "careful examination of [the Commission's] opinion, the evidence relied upon by the Commission and the other evidence in the case constrains us to hold that the Commission's determination ignored not only the guideposts of our original decision, but also the substantial weight of the evidence before it".

The Court further found that "an objective and rational examination of all the evidence reveals such equitable factors . . ." that "make reparations an inappropriate remedy in this case"; that it was unable to find a basis for the Commission's new and belated challenge to Flota's "good faith"; that Flota had acted with "substantial justification"; that the law was "unsettled"; that Flota has acted as "promptly as

possible" and that there was "no evidence Flota in any way benefited by its exclusion of Consolo"; that the latter bore, at most only the loss of "speculative" and "unrealized" profits (App. B to Petition, pp. 10a, 18a); and that in view of the foregoing, and "the substantial evidence showing that it would be inequitable to assess damages against Flota in favor of Consolo, we must conclude that the Commission abused the discretion granted it under Section 22 of the Shipping Act. . . ."

The Court thus acted with complete propriety and wholly within traditional limitations of review of administrative agency action. Section 10(e), Administrative Procedure Act, 5 U.S.C. §1009(e); *Universal Camera Corp.* v. *National L.R.Bd.*, 340 U.S. 474 (1951) (on remand see 190 F.2d 420); *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961); *Federal Trade Com.* v. *Standard Oil Co.*, 355 U.S. 396 (1958); *Hall* v. *Celebrezze*, 314 F.2d 686 (C.A. 6th 1963); *Celanese Corporation of America* v. *N.L.R.B.*, 291 F.2d 224 (C.A. 7th 1961), *cert. denied*, 368 U.S. 925; *Local No. 3, etc.* v. *National Labor Relations Board*, 210 F.2d 325 (C.A. 8th 1954), *cert. denied* 348 U.S. 822. Where, as here, reviewing power on the facts has been vested in a Court of Appeals it is settled policy that the Supreme Court will not undertake a further reappraisal of the record. *Communist Party* v. *S.A.C. Board, supra*, 367 U.S. at p. 69 (and cases cited); *Peurifoy* v. *Commissioner*, 358 U.S. 59 (1958); *Federal Trade Com.* v. *Standard Oil Co., supra*, 355 U.S. at pp. 400-401.

The decision below is also supportable on the ground that the Commission attorneys, who had previously acted as adversaries against Flota in this litigation, improperly participated and advised in the Commis-

sion's decision on remand.[18] The Court below found it unnecessary to rule upon this issue (see App. C to Petition, p. 19a, n. 16). It is supportable on the additional ground that the Commission failed to apply the proper measure of damages, as set forth in *Interstate Com. Commission* v. *United States,* 289 U.S. 385, 389-90, 393 (1933), and that Petitioner failed to prove compensable damages. In its April 1962 opinion, the Court referred to the measure of damages employed by the Board and later by the Commission as "relatively harsh" (App. C to Petition, p. 37a); in its December 17, 1964 decision, it referred to Plaintiff's claimed damages as the loss of "speculative" and "unrealized" profits (App. B to Petition, pp. 10a, 18a).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ODELL KOMINERS
J. ALTON BOYER
529 Tower Building
Washington, D. C. 20005
Attorneys for Respondent Flota Mercante Grancolombiana, S.A.

May 14, 1965

[18] See Morgan v. United States, 304 U.S. 1, 19-20 (1938); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Amos Treat & Co. v. Securities and Exchange Commission, 113 App. D.C. 100, 306 F.2d 260 (1962); Trans World Airlines v. Civil Aeronautics Board, 102 App. D.C. 391, 254 F.2d 90, 91 (1958); Administrative Procedure Act, Section 5(c) (5 U.S.C. § 1004(c) and Section 8(b) (5 U.S.C. § 1007(b)); Final Report of the Attorney General's Committee on Administrative Procedure (1941), page 56.